

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

77-7066

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

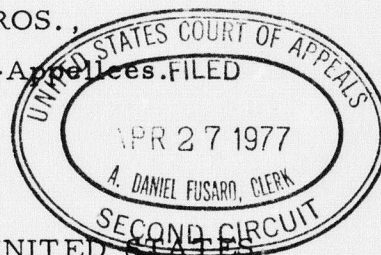
WALTER PARSELL and VIOLET PARSELL,
GEORGE HOOPER,
HOUSATONIC MARINA, INC., SHELLFISH
LABORATORY, a partnership by EDWIN C.
FORDHAM, partner and EDWIN C. FORDHAM,
EAST END YACHT CLUB, INC., individually
and on behalf of various pleasure boat owners,

Plaintiffs-Appellants,

-against-

SHELL OIL COMPANY and BUCKLEY BROS.,

Defendants-Appellees.



ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT, DISTRICT OF CONNECTICUT

PLAINTIFFS-APPELLANTS' BRIEF

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(6257)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WALTER PARSELL and VIOLET PARSELL,
GEORGE HOOPER, HOUSATONIC MARINA,
INC., SHELLFISH LABORATORY, a
partnership by EDWIN C. FORDHAM,
partner, and EDWIN C. FORDHAM,
EAST END YACHT CLUB, INC., in-
dividually and on behalf of various
pleasure boat owners,

Docket No. 77-7066

Plaintiffs-Appellants,

-against-

SHELL OIL COMPANY and BUCKLEY BROS.,

Defendants-Appellees.

-----X

PLAINTIFFS-APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This appeal is from an order of the United States District Court for the District of Connecticut (John O. Newman, J.) striking plaintiffs' demand for a jury.

The Court below certified that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion,***" and this Court, by order dated January 28, 1977 granted leave to

appeal, pursuant to 28 U.S.C. §1292 (b).

The opinion of the Court below was reported at 421 F. Supp. 1275.

MAIN ISSUE PRESENTED

Are private persons who suffer damages to their docks, shellfish beds and other private property, resulting from water pollution caused by an oil spill into the navigable waters of the United States, entitled to a jury trial, pursuant to 28 U.S.C. §1331.

SUBSIDIARY ISSUES

1. Do private persons suffering damage as a result of water pollution, caused by spillage of oil into the navigable waters of the United States, to docks, shellfish beds and other private property have an implied private right of action for damages under 33 U.S.C.A. §407.

2. Do persons suffering damage to docks, shellfish beds and other private property, as a result of water pollution caused by spillage of oil into the navigable waters of the United States, have a private right of action under the federal common law of water pollution.

3. Are persons suffering damages to docks, shellfish beds and other personal property, resulting from water pollution caused by an oil spill into the navigable waters of the United States, bringing their action in the Federal Court which concededly has jurisdiction in admiralty, entitled to a jury trial, pursuant to the Seventh Amendment of the Constitution of the United States and section 38 (a) of the Federal Rules of Civil Procedure, based on the fact that their right of action historically could be brought in law before a Judge and Jury.

STATEMENT OF THE CASE

This action was brought to recover money damages to compensate plaintiffs for damage to their docks, shellfish beds and other personal property, resulting from water pollution caused by spillage of oil into the navigable waters of the United States by appellee.

Appellants owned and maintained property abutting and in the vicinity of Bridgeport Harbor into which appellee discharged upwards of 655,000 gallons of oil *(A-6).

Appellants demanded a jury on the face of the complaint, which demand was stricken by the order appealed

*(References are to pages of the appendix)

from, dated October 19, 1976 (A-9).

It has previously been held by the District Court that it has jurisdiction of appellants' cause of action in admiralty. (A-9)

Appellants contend, however, in addition, the Court has subject matter jurisdiction, pursuant to 28 U.S.C. §1331 (a), or that the Court has pendent jurisdiction which entitles them to a trial by jury.

P O I N T I

A PRIVATE RIGHT OF ACTION FOR MONEY
DAMAGES MAY BE DERIVED FROM 33 U.S.C.
§ 407.

Appellants, in their complaint, allege that their causes of action fall within the purview of the Rivers and Harbors Act, 33 U.S.C. § 407. (A-4)

33 U.S.C. § 407 is a member statute of a body of law enacted by Congress to protect the national waterways. In essence, it is a criminal statute. However, statutes providing for criminal penalty frequently provide the basis for a private cause of action for damages.

The Courts have consistently held that a private cause of action may be derived from 33 U.S.C. § 407, as well as the other statutes within the Rivers and Harbors

Appropriation Act of 1899, 33 U.S.C. § 401 et seq.

In Lauritzen v. Chesapeake Bay Bridge and Tunnel District, 259 F. Supp. 633 (ED Va. 1966), the Court held at page 638:

"It is true that the federal navigation regulations do not expressly provide a cause of action for injured parties as does the FELA, but such liability is clearly implied. Even though it be conceded that the statutes pertaining to the protection of navigable waters, 33 U.S.C. § 401 et seq., are penal in nature it is clear that civil liability may be derived therefrom, both in favor of the United States, United States v. Perma Paving Co., 332 F. 2d 754 (2 Cir. 1964), and private parties, Morania Barge No. 140, Inc. v. M. & J. Tracy, Inc., 312 F. 2d 78 (2 Cir. 1962)."

And in Morania Barge No. 140, Inc. v. M. & J. Tracy, Inc., 312 F. 2d 78 (2 Cir. 1962), the Court provided at page 80:

"Although 33 U.S.C. § 409 is a criminal statute, it reflects a legislative judgment of the standard of care to which owners of [sunken vessels] should be held in civil actions. Sullivan v. P. Sanford Ross, 263 F. 348 (2 Cir. 1920)."

In United States v. Jepson, 90 F. Supp. 983 (D NJ 1950) the Court held at page 986:

"It is my thought that when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the constitutional right of trial by jury by mere statutory enactments."

In Hawkinson v. Blandin Paper Company, 54 F.R.D. 517 (D. Minn. 1972), in addition to upholding the right of a private party to bring an action under 33 U.S.C. § 407 (within the meaning of 28 U.S.C. § 1331 (a)), that Court impliedly held that such action provides for trial by jury, as a matter of right. There, the plaintiff was denied a jury trial in the Court's discretion by reason of the plaintiff's untimely demand for a jury.

P O I N T I I

THE DISCHARGE OF OIL INTO THE NAVIGABLE WATERS OF THE UNITED STATES IS WITHIN THE RIVERS AND HARBORS APPROPRIATION ACT OF 1899, 33 U.S.C. § 407, WHICH BANS DEPOSIT OF REFUSE MATTER OF ANY KIND OR DESCRIPTION INTO NAVIGABLE WATERS.

It is clear that the Refuse Act prohibits all discharge of pollution matter other than sewage onto

navigable waters, regardless of its source or continuing nature and irrespective of its effect on navigation.

United States v. Consolidated Coal Co., 354 F. Supp. 173 (N.D. W.Va. 1973) and cases cited therein.

In May of 1973 the Supreme Court of the United States in United States v. Pennsylvania Industrial Chem. Corp., 411 U.S. 655, 93 S. Ct. 1804 (1973), made it clear that the Congressional intent manifested by 33 U.S.C. § 401 et seq., including § 407, was to provide protection to the natural water courses in all respects. The Court stated at pages 1814, 1815:

"[11] At the outset, we observe that the issue here is not whether §13 in fact applies to water deposits that have no tendency to affect navigation. For, although there was much dispute on this question in the past,²³ in United States v. Standard Oil Co., supra, we held that "the 'serious injury' to our watercourses ... sought to be remedied[by the 1899 Act] was caused in part by obstacles that impeded navigation and in part by pollution," and that the term "refuse" as used in § 13 "includes all foreign substances and pollutants "384 U.S., at 228-229, 230, 86 S. Ct. at 1429, 1430.²⁴ See also Illinois v. City of Milwaukee, 406 U.S. 91, 101, 92 S. Ct. 1385, 1391, 31 L.Ed. 2d 712 (1972). Since then, the lower courts have almost universally agreed, as did the courts below, that §13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized

deposit of foreign substances into navigable waters, regardless of the effect on navigation. See, e.g. United States v. Granite State Packing Co., D.C., 343 F. Supp. 57, aff'd 470 F. 2d 303 (CA 1 1972); United States v. Esso Standard Oil Co. of Puerto Rico, 375 F. 2d 621 (CA3 1967); United States v. Consolidation Coal Co., 354 F. Supp. 173 (N.D. W. Va. 1973); United States v. Genoa Cooperative Creamery Co., 336 F. Supp. 539 (W.D. Wis. 1972); United States v. Maplewood Poultry Co., 327 F. Supp. 686 (D.C. Me. 1971); United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969); contra, Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala. 1971), aff'd 456 F. 2d 1294 (CA 5 1972)." (Emphasis supplied)

The Court's attention is respectfully directed to the ".....contra, Guthrie v. Alabama By-Products....." as stated in the foregoing quotation. The Guthrie case is clearly against the weight of authority cited by the Supreme Court.

See also:

United States v. Republic Steel Corp.,
362 U.S. 482, 80 S. Ct. 884 (1960)

United States v. Ira S. Bushey & Sons, Inc.,
363 F. Supp. 110 (1973)

United States v. Ballard Oil Co.,
195 F. 2d 369 (1952)

La Merced, 84 F. 2d 333 (9 Cir. 1936)

United States v. Maplewood Poultry Company,
327 F. Supp. 686 (D. Me. 1971)

United States v. Standard Oil Company,
384 U.S. 224, 86 S. Ct. 1427 (1966)

This Court, in Connecticut Action Now, Inc., v. Roberts Plating Co. Inc., 457 F. 2d 81 (2 Cir. 1972), left open the question "Whether a private claimant specifically injured by a violation of §407--a riparian owner, for instance--can sue for an injunction or damages***".

The Court went on to state at page 90, footnote 16:

"A strong case against the right, at least where the injury is not related to navigation, is made in Guthrie v. Alabama By-Products Co., supra, 328 F. Supp. 1140 (N.D. Ala. 1971)."

This Court's decision in Connecticut Action Now, of course, was before the decision by the Supreme Court of the United States in United States v. Pennsylvania Industrial Chem. Corp., supra.

It should be noted that in Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala. 1971), aff'd 456 F. 2d 1294 (CA 5 1972), the Court did not deny the right of a private suit pursuant to § 407. In fact, it cited several cases to the effect that where injury to

rights of navigation or anchorage are asserted there could be the basis of an implied federal cause of action (328 F. Supp. 1146, footnote 17).

Guthrie did deny that a federal cause of action existed under §407 where the pled theory was unrelated to navigation or anchorage, but this decision was based on the conclusion that §407 was designed merely to protect navigation and anchorage. This holding is contrary to the clear weight of authority. United States v. Pennsylvania Industrial Chem. Corp., supra, and cases cited on page 8 of this brief.

At least two of the named appellants in this action claim damages to dock areas which might even come within the narrow holding of the Guthrie case.

P O I N T I I I

THIS COURT HAS JURISDICTION OF APPELLANTS' CAUSE OF ACTION, PURSUANT TO 28 U.S.C. § 1331 (a) AS THE ACTION IS BROUGHT PURSUANT TO THE "LAWS" OF THE UNITED STATES.

The Supreme Court of the United States in Illinois v. City of Milwaukee, Wisconsin, 406 U.S. 91, 92 S. Ct. 1385 (1972) has held that neither diversity nor federal statutory law is necessary to maintain a federal

civil action for damages arising from pollution of interstate or navigable waters. There, the Court stated at page 1390:

"The question is whether pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of § 1331 (a). We hold that it does...."

P O I N T I V

APPELLANTS ARE ENTITLED TO A TRIAL BY JURY, PURSUANT TO THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND § 38 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The District Court, concededly, has jurisdiction of the within action in admiralty.

The cause of action, however, is one that would have been tried before a Court and Jury prior to the passage of the Seventh Amendment. United States v. Strymish, 86 F. Supp. 999 (Mass. 1949).

Despite the fact that separate theories or causes of action were not alleged in the complaint, this Court has pendent jurisdiction over the action at law. Ohio Barge Line, Inc. v. Dravo Corporation, 326 F. Supp. 863 (1971); United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F. 2d 800 (1971) (2 Cir.).

In determining whether the right to a jury trial under the Seventh Amendment and Federal Rules of Civil Procedure, 38 (a) applies to a given cause of action, the test applied is whether the action historically could be brought to law.

Ross v. Bernhard,
403 F. 2d 909 (2 Cir. 1968), rev'd on other grounds, 396 U.S. 531, 90 S. Ct. 733

Ramsom v. Staso Milling Co.,
2 F.R.D. 128 (1941)

Arkweight Mutual Ins. Co. v. Philadelphia Electric Co., 427 F. 2d 1273 (3 Cir. 1970)

5 Moores Federal Practice, 2nd Ed. para.
38.11 at pages 118, 119; para. 38.19
at page 166

Where questions of negligence and causation exist and the action is for money damages for injury to property, there is a right to a jury trial.

Ramsom v. Staso Milling Co. supra

Arkweight Mutual Ins. Co. v. Philadelphia Electric Co., supra

Clearly, where the damages constitute the sole relief sought the action is legal in character and there is normally a constitutional right to a jury trial.

Kastner v. Brackett,
326 F. Supp. 1151 (D. Nev. 1971)

In the instant action, the sole relief sought by appellants is monetary damages for injuries to property occasioned by appellee's negligence.

The case here is one formerly at law known as trespass on the case, embracing suits to recover damages for negligence.

Ransom v. Staso Milling Co. supra

Domskey v. Zavatt,
289 F. 2d 46 (2 Cir. 1961)

CONCLUSION

The Court below should be reversed and appellants' demand for a jury endorsed on their complaint should be allowed to stand.

Respectfully submitted,

GOLDMAN & ROSEN,
Attorneys for Plaintiffs-Appellants

RASSNER, RASSNER & OLMAN,
Of Counsel

ALAN C. RASSNER,
On the Brief.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JULIO VALLEJO, JR., being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 703 REMSEN AVE.
BROOKLYN, NYC.

That on the 27 day of April, 1977,
deponent personally served the within Plaintiffs-Appellants
Brick
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving true copies of same with a duly
authorized person at their designated office.

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PULLMAN, COMLEY, BRADLEY & REEVES
ATTORNEYS FOR DEFENDANTS-APPELLEES
855 MAIN ST.
BRIDGEPORT, CONN. 06604

Sworn to before me this

27 day of April, 1977

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0030903
Qualified in Queens County
Commission Expires March 30, 1979

Julio Vallejo JR